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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6595

DONALD LEE WILLIAMS,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND THE COURT OF APPEALS OF NORTH CAROLINA

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The Petitioner, Donald Lee Williams, respectfully prays that writs of certiorari issue from this Court to review the judgments of the North Carolina Court of Appeals and the North Carolina Supreme Court which were entered in this cause. The North Carolina Court of Appeals affirmed the Petitioner's criminal conviction and sentence in a judgment which was entered on November 16, 1977. The North Carolina Supreme Court dismissed the Petitioner's appeal from the decision of the North Carolina Court of Appeals in a judgment entered on January 24, 1978.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported, without published opinion, at 34 N.C.App. 502, 239 S.E.2d 69 (1977). That opinion is reproduced in the Appendix, infra, at pp. A2-A5. The opinion of the North Carolina Supreme Court, dismissing the Petitioner's appeal from the judgment entered by the North Carolina Court of Appeals, is reported at 294 N.C. 187, 241 S.E.2d 73 (1978). The opinion is reproduced in the Appendix, infra, at p. A1.

JURISDICTION

The judgment of the North Carolina Supreme Court, which is the Court of highest jurisdiction in the State of North Carolina, was entered on January 24, 1978. The instant petition for writs of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The Petitioner was convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor, third offense, in the Durham County, North Carolina, Superior Court. He was sentenced, as a third time offender of the "driving under the influence" statute, to a one-year term of imprisonment. The Petitioner was convicted upon trial by jury in the Superior Court after he had exercised his right to appeal for a trial de novo from judgments and commitments issued by the Durham County District Court, the Court of original jurisdiction. In the District Court the Petitioner was convicted of two offenses, operating a motor vehicle while under the influence of intoxicating liquor (third offense) and operating a motor vehicle without a license. He was sentenced to serve a six-month term of imprisonment by the District Court, in contrast to the one-year prison sentence ordered by the Superior Court after the Petitioner had appealed and was convicted solely on the charge of operating a motor vehicle while under the influence of intoxicating liquor, third offense. The Petitioner was acquitted of the other charge in the Superior Court. Prior to the time that the Superior Court judge sentenced the Petitioner to the one-year term of imprisonment that judge had before him all of the records of the Petitioner's case which had been forwarded from the District Court, including the notation that the Petitioner had received a sentence of six-months imprisonment from the District Court in punishment for his convictions on the two offenses.

The Petitioner was convicted for a third offense of operating a motor vehicle while under the influence of intoxicating liquor, based upon the existence of two prior driving under the influence convictions on his criminal record. The Petitioner had been indigent, unrepresented by counsel, and had not knowingly waived his right to representation by counsel at the time that each of those prior convictions was obtained. The Petitioner did not receive jail sentences subsequent to either of the two

prior driving under the influence convictions, but he was fined on each occasion, and he could not have been sentenced to the one-year term of imprisonment which he is currently serving but for the existence of the two prior, uncounselled convictions which were used to support the Petitioner's conviction and sentencing as a third time offender of the statute. Further, the Petitioner did not take the witness stand to testify on his own behalf at his trial because the Superior Court judge ruled that, upon the Petitioner's taking the witness stand, the District Attorney would have been permitted to inquire of the Petitioner's prior uncounselled driving under the influence convictions, for the purpose of impeaching the Petitioner and his testimony.

Based on these facts the questions presented for review are as follows:

1. Whether the North Carolina procedure concerning appeals for trial de novo, which, as a matter of course, puts the trial de novo court, the Superior Court, on notice of the convictions and the terms of the sentence from which appeal was taken from the Court of original jurisdiction, the District Court, and which frequently or routinely results in harsher criminal sentences being imposed upon the trial de novo -- as exemplified by the instant case where the Petitioner was convicted of two offenses in the District Court and there received a six-month prison sentence, where the Superior Court was on noticeof the same following the Petitioner's appeal for trials de novo, and where the Superior Court proceeded to sentence the Petitioner to a harsher, one-year term of imprisonment after he was convicted of only one of the two offenses in Superior Court and was acquitted of the other -- is inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Whether a criminal defendant, consistently with the Sixth and Fourteenth Amendments to the United States Constitution, may be convicted as a third time offender of a criminal statute, and receive the increased punishment allowed only for third time offenders, when the prior two convictions, without which the increased punishment could not have been imposed, were obtained when that defendant was indigent, was unrepresented by counsel and had not waived his right to be represented by counsel?

3. Whether, consistently with the Sixth and Fourteenth Amendments to the United States Constitution, prior convictions on a defendant's

criminal record may be used to impeach the Defendant's testimony at a subsequent criminal trial, culminating with the Defendant's conviction and his being sentenced to prison, when the prior, impeaching convictions were obtained when the Defendant was indigent, uncounselled, and had not waived his right to counsel, although the prior convictions did not, when imposed, result in prison sentences?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.C.G.S. § 7A-271 (b) (1977 Supp.):

"Appeals by the . . . defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance."

N.C.G.S. § 20-138 (a) (1975):

"It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within the State."

N.C.G.S. § 20-179 (a) (1975):

"Every person who is convicted of violating G.S. 20-138 . . . shall be punished as follows:

(1) For the first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(2) For a second conviction of any offense under G.S. 20-138, . . . by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than two months nor more than six months, or by both such fine an imprisonment, in the discretion of the court.

(3) For a third or subsequent offense under G.S. 20-138, . . . by a fine of not less than five hundred dollars ($500.00), by imprisonment

for not more than two years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT OF THE CASE

The Petitioner was originally brought for trial in the Durham County, North Carolina District Court under a warrant which charged him with operating a motor vehicle while under the influence of intoxicating liquor (third offense), and with operating a motor vehicle without being licensed. The Petitioner entered pleas of guilty to both offenses, judgments were entered accordingly, and the Petitioner was sentenced to serve a term of six months in prison. The Petitioner thereafter exercised his right to appeal to the Durham County Superior Court for trials de novo on the charges. All of the files maintained on the District Court proceedings, including the fact of the convictions and the terms of the Petitioner's sentence, were forwarded to the Superior Court prior to the Petitioner's trial in that Court.

Following the appeal from District Court, and after trial by jury, the Petitioner was convicted in Superior Court of the crime of operating a motor vehicle while under the influence of intoxicating liquor, in violation of N.C.G.S. § 20-138. He was acquitted on the charge of operating a motor vehicle without being licensed. The Petitioner was punished as one who had suffered his third conviction under the driving under the influence statute, as allowed by N.C.G.S. § 20-179 (a)(3). The Superior Court judge sentenced the Petitioner to serve a one-year term of imprisonment, although the District Court had imposed only a six month sentence where the Petitioner had been convicted on two offenses, in contrast to the sole conviction which was returned in the Superior Court.

The Petitioner was convicted in Superior Court, and sentenced as a third time offender of the driving under the influence statute, on February 15, 1977. The punishment statute authorizes the imposition of a maximum six month term of imprisonment for those convicted under the driving under the influence statute on fewer than three occasions, N.C.G.S. §§ 20-179 (a)(1), (2), and allows for a sentence of up to two years upon third and subsequent convictions. N.C.G.S. § 20-179 (a)(3). The two prior convictions for driving under the influence were obtained against the Petitioner on June 17, 1966 and on December 10, 1974. As to each of those convictions the Superior

Court judge specifically found, as of record, that: "There is no indication in the record that the [Petitioner] had counsel, or that he, by any affirmative act, waived counsel, . . . and the Court assumes for the purpose of this ruling that he was indigent at that time." (Record on appeal to North Carolina Court of Appeals at p. 19). Following each of the prior convictions the Petitioner was fined $100.00 and ordered to pay the costs of Court. He did not receive a jail sentence, either active or suspended, following either of his prior uncounselled convictions. The Superior Court judge ruled that the 1966 and the 1974 driving under the influence convictions could lawfully be considered to support the Petitioner's conviction and sentencing as a third time offender of the statute. Although the Petitioner received no jail sentence following either of his two previous convictions, the one-year jail sentence which the Petitioner was ordered to serve following his 1977 conviction as a third time offender could not have been imposed but for the existence of the two prior uncounselled driving under the influence convictions on his criminal record.

The Superior Court judge further ruled that, in the event the Petitioner took the witness stand to testify on his own behalf at his trial, the District Attorney would be allowed to inquire of the 1966 and 1974 uncounselled driving under the influence convictions, for impeachment purposes. Following that ruling the Petitioner did not take the witness stand to offer his own testimony at the trial.

The Petitioner began service of his one-year prison sentence pursuant to his convictions as a third time offender of the statute proscribing the operation of a motor vehicle while under the influence of intoxicating liquor on February 20, 1978.

The three issues which the Petitioner respectfully requests this Court to review upon its writ of certiorari -- (1) the Superior Court's imposition of a more lengthy term of imprisonment than was imposed in the District Court after the Petitioner appealed for a trial de novo, when the Superior Court was on notice of the District Court's sentence; (2) the imposition of a one-year jail sentence on the Petitioner, as a third time offender of the driving under the influence statute, which could not have been imposed but for the existence of two prior convictions which were obtained when the Petitioner was indigent, unrepresented by counsel, and had not waived his right to counsel; and (3) the ruling by the Superior Court

that the Petitioner's prior uncounselled convictions could have been used to impeach the Defendant in the event that the Defendant took the witness stand to testify on his own behalf -- were timely and properly raised in the Durham County Superior Court (the trial court), in the North Carolina Court of Appeals and in the North Carolina Supreme Court.

The first issue, concerning the imposition of a lengthier term of imprisonment on the Petitioner after he had appealed for trials de novo to the Superior Court, was noted as Exception No. 11, at p. 29 of the record on appeal submitted to the North Carolina Court of Appeals. That same issue was presented as the Petitioner's Sixth Assignment of Error, at pp. 32-33 of the record on appeal, and was included as his Fourth Question for Review in the Brief which was submitted to the North Carolina Court of Appeals, beginning at p. 24 of the Brief. The North Carolina Court of Appeals denied the Petitioner relief on that ground, and the Petitioner appealed to the North Carolina Supreme Court. He raised the issue before the North Carolina Supreme Court in the second grouping of constitutional issues presented for review on appeal, and that Court dismissed the appeal, denying the Petitioner any relief.

The second issue presented upon the instant petition for writ of certiorari, concerning punishing the Petitioner as a third time offender of the driving under the influence statute when his prior convictions were obtained when he was indigent, without counsel, and had not waived his right to counsel, was also properly raised in the state courts. Counsel for the Petitioner objected to the Superior Court's consideration of the previous convictions prior to the time that the judgment was entered and sentence was imposed. The Superior Court overruled the objection and entered judgment and imposed sentence on the Petitioner as a third time offender. This issue was preserved in the Petitioner's Exceptions Nos. 7, 9 and 10, as appears at pp. 20, 28-29 of the record on appeal submitted to the North Carolina Court of Appeals. The issue was presented as the Petitioner's Fourth Assignment of Error, at p. 32 of the record on appeal, and was briefed as the Third Question Presented for Review, beginning at p. 19 of the Brief which the Petitioner submitted to the North Carolina Court of Appeals. The North Carolina Court of Appeals denied the Petitioner relief on that issue and the Supreme Court of North Carolina dismissed the appeal from that order. The issue was included in the first grouping of

constitutional issues in the Notice of Appeal which the Petitioner filed with the North Carolina Supreme Court.

The third issue presented in the instant petition for writ of certiorari, concerning the Superior Court's ruling that the Petitioner's prior uncounselled driving under the influence convictions could be inquired of for impeachment purposes in the event that the Petitioner testified on his own behalf at trial, was duly raised and preserved in the state courts. Counsel for the Petitioner raised the issue prior to the time that the defense put on evidence at the trial in the Superior Court. The trial judge ruled that the prior, uncounselled convictions could be used for impeachment purposes, and overruled the Petitioner's objection to the ruling, as appears at p. 20 of the record on appeal submitted to the North Carolina Court of Appeals. The Petitioner excepted to the ruling, and presented the issue as his Fifth Assignment of Error, as noted at pp. 20 and 32 of the record on appeal. The issue was the Second Question Presented for Review in the North Carolina Court of Appeals, and was briefed beginning at p. 12 of the Petitioner's Brief in the North Carolina Court of Appeals. The North Carolina Court of Appeals denied the Petitioner relief on the issue, and the North Carolina Supreme Court dismissed the Petitioner's appeal. The issue was included in the first grouping of constitutional questions contained in the Petitioner's Notice of Appeal in the North Carolina Supreme Court.

REASONS FOR GRANTING THE WRITS

I.

The writs should issue to correct the unlawful North Carolina procedure which routinely allows Superior Court judges to be put on notice of the nature and magnitude of the punishment received by criminal defendants in District Courts prior to the defendants' exercising their rights to trials de novo in the Superior Court, and then, being put on such notice, imposing harsher sentences than were administered in the District Courts prior to the trials de novo. In the instant case the Petitioner was convicted, after his pleas of guilty, of two offenses in the Durham County District Court -- operating a motor vehicle while under the influence of intoxicating liquor (third offense) and operating a motor vehicle without being licensed -- and was sentenced to serve a six month term of imprisonment. The Petitioner

appealed for a trial de novo before a jury in the Superior Court, where he was acquitted of the offense of operating a motor vehicle without being licensed, but was convicted of his third offense for operating a motor vehicle while under the influence of intoxicating liquor. The Superior Court judge, who had the record of the Petitioner's prior convictions and six month sentence which had been made in the District Court before him when he passed sentence on the Petitioner, ordered the Petitioner to serve a lengthier, one-year term of imprisonment, notwithstanding the fact that the Petitioner had been acquitted of one of the charges of which he had been convicted in the District Court, and notwithstanding the less onerous, six month sentence imposed by the District Court judge. The North Carolina procedure concerning the sentencing of criminal defendants after trials de novo by Superior Court judges, who are on notice of the sentence imposed by the District Court upon the original trials, with its regular effect of allowing for the administration of harsher punishments to defendants who have exercised their rights to appeal for trials de novo, is inconsistent with this Court's decisions in North Carolina v. Pearce, 395 U.S. 711 (1969) and its progeny, including Colten v. Kentucky, 407 U.S. 104 (1972), Chaffin v. Stynchcombe, 412 U.S. 17 (1973), Blackledge v. Perry, 417 U.S. 21 (1974) and Ludwig v. Massachusetts, 427 U.S. 618 (1976).

Original jurisdiction of misdemeanors in North Carolina, such as the offenses for which the Petitioner was originally convicted, operating a motor vehicle while under the influence of intoxicating liquor (third offense) and operating a motor vehicle without being licensed, lies in the District Court. N.C.G.S. § 7A-272. Trial is before a judge. A defendant who is convicted of a misdemeanor in District Court has a right to appeal for a trial de novo to Superior Court, where he is tried before a jury and, if convicted, sentenced by the Superior Court judge. N.C.G.S. §7A-290. Upon appeal for a trial de novo the Clerk of the District Court is required to transfer the case to Superior Court, and all records maintained in the District Court, including those of the convictions and sentences, are forwarded in the case file which is delivered to the Superior Court judge in advance of the trial de novo. In the Petitioner's case the District Court record denoting the Petitioner's convictions for the two offenses, of driving under the influence, third offense, and of operating a motor vehicle without

being licensed, and further noting that he had been sentenced to serve six months in prison as punishment therefor , was forwarded to the Superior Court when the Petitioner appealed for a trial de novo. The record was before the Superior Court judge, and that judge was on actual or constructive notice of the two convictions and of the sentence which resulted from the District Court proceedings, when he sentenced the Petitioner to the more onerous sentence following his conviction of only the single offense of operating a motor vehicle while under the influence of intoxicating liquor (third offense).

North Carolina v. Pearce, 395 U.S. 711 (1969) sets forth the general principle that, absent specific findings of fact and objective support from the record justifying an increase in sentence, an accused who successfully appeals from an initial conviction but who is convicted of the same offense upon a subsequent trial, may not, following the appeal, receive punishment in excess of that originally imposed. The Pearce rule is designed not only to eliminate vindictiveness or punishment from being imposed on one who successfully exercises his right of appeal, but also to eliminate even the threat or appearance of vindictiveness or impropriety.

The instant case is different from that presented in Colten v. Kentucky, 407 U.S. 104 (1972), where this Court noted that, upon a trial de novo to a higher trial court in the State of Kentucky, "[a]s far as we know, the record from the lower court is not before the superior court and is irrelevant to its proceedings. In all likelihood the trial de novo court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence". Id. at 117-118. Here, the record of the District Court proceedings was before the Superior Court when it imposed its harsher sentence on the Petitioner -- a fact which appears of record at pp. 2-3 of the record on appeal submitted to the North Carolina Court of Appeals. The Superior Court judge was either on actual or constructive notice (which would cause an apprehension or present a threat of vindictiveness) of the lesser sentence ordered by the District Court. In Colten, moreover, only a harsher fine was imposed on the defendant upon trial de novo; the more fundamental deprivation of liberty, which is here at stake, was not there presented for consideration.

As in the instant case, Superior Court judges in North Carolina frequently impose lengther prison sentences upon trials de novo. This case is

thus not the same as that presented in Ludwig v. Massachusetts, 427 U.S. 618 (1976). In Ludwig the defendant actually received the same sentence, following his appeal for a trial de novo, which had been imposed by the Court of original jurisdiction. This Court observed that the Appellant "was not subjected to vindictive sentencing. He received a nominal fine of $20.00 at both proceedings. Further, the suggestion that vindictive sentencing is a serious problem in Massachusetts is belied by another of appellant's claims: 'In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court . . . . If the accused is convicted again, the resentencing judge as a matter of practice usually inquires initially as to why the lower court sentence should not be reimposed.' Brief for Appellant 43. It is argued that this procedure 'manifestly discourages 'appeals.'' Ibid. We are unable to see why. If the chances are great that an accused who has been convicted at the first tier will receive the same sentence at the second tier if he is again convicted, there is little reason not to appeal and take the 'risk' of an acquittal." Id. at 628, n. 4. Here, of course, the Petitioner actually did receive an increased sentence upon his trial de novo, and the North Carolina Supreme Court has expressly held that the chances are not at all "great" that the accused will not expose himself to the risk of increased punishment following his appeal. "To hold that upon appeal the Superior Court judge may decrease the sentence imposed below but is precluded from increasing it would necessarily destroy the district court system of this State. . . . [The Superior Court judge's] sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the maximum punishment which the inferior court could have imposed. Such is the rule in North Carolina." State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897, 903 (1970). Unlike the Massachusetts procedure involved in Ludwig, in North Carolina no inquiry is made by the trial de novo judge as to why the original sentence should not be reimposed, and the State policy is, expressly, to retain the threat of harsher punishments upon trials de novo so that appeals will not liberally be taken from the original proceedings, thereby "destroying" the State's District Court system.

The instant case is further distinguishable from another in the line of cases emanating from the doctrine of North Carolina v. Pearce, supra. In

Chaffin v. Stynchcombe, 412 U.S. 17 (1973), this Court upheld the imposition of a harsher sentence following the retrial of a defendant who had successfully appealed his original conviction. In Chaffin, however, the jury, which could have had no knowledge of the accused's prior conviction, sentence or appeal, and which was cognizant of none of the institutional concerns which might have occasioned higher sentencing by a judge following an appeal, was the body which determined the length of the second, harsher sentence. The jury did not have the knowledge of the prior sentence of the appeal, nor did its harsher sentence present even the specter of vindictiveness or impropriety in the form of discouraging or punishing appeals. Id. at 26-28. Here, the Superior Court judge, who was on notice of the Petitioner's prior sentence, convictions and appeal, and who was attuned to the institutional concerns related to appeals, imposed the harsher sentence. Superior Court judges, manifestly, must be charged with awareness of the North Carolina Supreme Court's policy declaration, or institutional concern, concerning higher sentences on appeal -- that "to hold that upon appeal the Superior Court judge may decrease the sentence imposed below but is precluded from increasing it would necessarily destroy the District Court system of this State." State v. Sparrow, supra.

Blackledge v. Perry, 417 U.S. 21 (1974), another of the progeny of North Carolina v. Pearce, supra, noted that "[t]he lesson that emerges from Pearce, Colten and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness. . . . The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of his right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.' 395 U.S. at 725." Id. at 27-28. With the Superior Court judge having notice of the accused's appeal and of his sentence from his earlier conviction, there is clearly a realistic likelihood that vindictiveness or punishment may figure into the sentence imposed following conviction on trial de novo. This is especially so given the declaration of the North Carolina Supreme Court in State v. Sparrow, supra, that the threat of harsher punishments after trials

de novo must be present so that Superior Courts are not inundated by appeals and so that the District Court system may be maintained. In the instant case the potential for vindictive sentencing upon trial de novo is made all the more real. On his original convictions in the District Court for two offenses (driving under the influence, third offense, and driving without a license) the Petitioner received only a six month sentence. Following his appeal he was acquitted on the charge of driving without a license, but for the single conviction of driving under the influence, third offense, with the Superior Court judge on notice of the six month sentence, the Petitioner received a harsher sentence (one year) than had originally been imposed. Given all of these circumstances the Petitioner's conviction and sentence should be reviewed upon this Court's writ of certiorari so that the procedure for sentencing on trials de novo which exists on a statewide basis in North Carolina may be submitted to the critical scrutiny of this Court.

II.

The Petitioner was convicted, in 1966 and in 1974, of operating a motor vehicle while under the influence of intoxicating liquor. He was indigent, was not represented by counsel, and he had not waived his right to representation by counsel when each of those convictions was obtained. Following the 1966 and 1974 convictions the Petitioner was fined, but was not sentenced to prison. When the Petitioner was convicted of the instant, 1977 offense for operating a motor vehicle while under the influence of intoxicating liquor, he was represented by counsel. He was sentenced to serve one year in prison, as a third-time offender of the "driving under the influence" statute. He could not have received a prison sentence in excess of six months were he not ajudicated as being a third-time offender of the statute. N.C.G.S. § 20-179. The one year prison sentence could not have been imposed on the Petitioner but for the existence of the two prior uncounselled driving under the influence convictions which were on his criminal record. Thus, while the Petitioner did not receive prison sentences immediately following his uncounselled convictions in 1966 and 1974, the one year sentence which he is presently serving was imposed as a direct result of the prior uncounselled convictions. This Court's writs of certiorari should issue to review the substantial and recurring constitutional question of whether a prison sentence or an enhanced prison sentence may be imposed upon a criminal defendant

because he is a repeat offender of a statute when the prior convictions which serve to define the defendant as a repeat offender were obtained when the defendant was indigent and unrepresented by counsel, although the prior convictions did not result in prison sentences at the time which they were originally obtained. The decisions by the North Carolina Court of Appeals and the North Carolina Supreme Court, in allowing for the imposition of a one-year prison sentence on the Petitioner, which could not have been imposed but for the existence of two prior uncounselled convictions on his criminal record, are in conflict with Argersinger v. Hamlin, 407 U.S. 25 (1972), Burgett v. Texas, 389 U.S. 109 (1967) and with the Sixth and Fourteenth Amendments to the United States Constitution.

It cannot be overemphasized that the one-year prison sentence which the Petitioner received in the instant case could not have been imposed but for the existence of two prior driving under the influence convictions on his record which were obtained when he was indigent, unrepresented by counsel, and had not knowingly waived his right to representation by counsel. Prison sentences were not imposed immediately following the Petitioner's uncounselled 1966 and 1974 convictions. The one year prison sentence imposed following the Petitioner's 1977 driving under the influence conviction was every bit as much of a direct result of the two uncounselled convictions, however, as if sentences had been imposed immediately upon the return of the 1966 and 1974 convictions. Sentencing the Petitioner to the increased punishment allowed for third offenders of the driving under the influence statute in 1977 merely delayed punishment by imprisonment for the prior uncounselled convictions. Because the Petitioner's one year prison sentence was imposed as the direct and proximate result of the two uncounselled convictions on his record, the Petitioner has been deprived of rights guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution to effective assistance of counsel, to not be deprived of his liberty without due process of law, and to the equal protection of the laws. Argersinger v. Hamlin, 407 U.S. 25 (1972), read in its most limited sense, established that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial." Id. at 37. The Court was not presented with, and therefore did not address, the question of whether an uncounselled defendant who was not deprived of his liberty following his criminal conviction is entitled to representation by court appointed counsel

when he cannot afford to retain an attorney. Id. Argersinger, was made fully retroactive in Berry v. Cincinnati, 414 U.S. 29 (1973). In the instant case the Petitioner is entitled to the benefit of the Argersinger rule even if Argersinger is limited to those cases where the conviction of an uncounselled, indigent defendant actually results in the defendant's loss of liberty. While the Petitioner's uncounselled driving under the influence convictions did not immediately cause his imprisonment, following their returns in 1966 and 1974, they directly and unqualifiedly were used to cause the Petitioner to be sentenced to serve one year in prison following his conviction in 1977 of operating a motor vehicle while under the influence of intoxicating liquor. The Petitioner's one year prison sentence was based upon and was caused by the fact that the State of North Carolina had, on two previous occasions, caused the Petitioner to be tried for and convicted of criminal misdemeanors when he was indigent, unrepresented by counsel, and had not waived his right to counsel. Because his one year prison sentence was the direct and proximate result of the prior uncounselled convictions on his record, and, indeed, the uncounselled convictions caused his incarceration, the Petitioner was denied those rights guaranteed him by the Sixth and Fourteenth Amendments to the United States Constitution, as set forth in Argersinger v. Hamlin, supra.

Burgett v. Texas, 389 U.S. 109 (1967) is of direct relevance to the instant case. In Burgett this Court held that prior convictions obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendants charged with felonies entitled to representation by court appointed counsel) could not be used to support the imposition of the enhanced punishment allowed by a recidivist statute. A prior, Tennessee felony conviction which was obtained against the defendant in Burgett, when there was no indication on the record that the defendant was represented by counsel when the conviction was returned, thus could not have been used to define the defendant as a recidivist under Texas law and to consequently expose him to the risk of enhanced punishment as a recidivist. There is no indication in Burgett whether the defendant received a prison sentence following the Tennessee felony conviction. As in the instant case, however, the prior, presumptively unlawful conviction could not have been used a s a basis to support enhanced punishment following a subsequent conviction where the defendant did have the benefit of counsel. Whether or not the defendant previously was incarcerated, immediately following the uncounselled conviction, makes the conviction no less valid to support subsequent punishment. "To permit a

conviction obtained in violation of Gideon v. Wainwright to be used against a person to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269, 86 S. Ct. 1477) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. 109, 115 (1967).

It is mere sophistry to maintain that an uncounselled conviction is entitled to legal validity depending upon whether, following the conviction, an active prison sentence was imposed upon the defendant. Regardless of whether a prison sentence was imposed immediately following such a conviction, the conviction was obtained when all of the resources of the State and the skill of a trained prosecutor were marshalled against an indigent, lay defendant. The conviction lacks fundamental fairness under those circumstances, as well as legal validity when later used to sustain enhanced punishment, independently of the terms of the sentence which was imposed after the fact of the conviction. Permitting the one year prison sentence to stand which the Petitioner received, in punishment for his third violation of the driving under the influence statute, would be to allow the State to accomplish indirectly that which it could not punish directly under the Argersinger principle. The Petitioner obviously could not have been sentenced for a third conviction of operating a motor vehicle while under the influence of intoxicating liquor were it not for the uncounselled convictions which were returned against him in 1966 and 1974. The Petitioner's third conviction, and the accompanying prison sentence which he received, were absolutely dependent upon and were a direct function of the existence of the prior uncounselled convictions. While the Petitioner was represented by counsel at his 1977 trial for driving under the influence, his prison sentence reflected the convictions returned against him in 1966 and 1974. Although the Petitioner was not sentenced to prison terms immediately following his prior convictions, but for the existence of those convictions he would not have been susceptible to receive the one year prison sentence which he received for the instant offense. Thus, in a very real sense, his prior uncounselled convictions resulted in the Petitioner being sentenced to a term of imprisonment for which he would not otherwise have been eligible, in fundamental violation of Argersinger v. Hamlin, Burgett v. Texas, supra, and those rights guaranteed the Petitioner under the Sixth and Fourteenth Amendments to the United States Constitution.

III.

The trial court ruled that, in the event the Petitioner took the witness stand to testify on his own behalf at his trial, the two prior convictions for driving under the influence of intoxicating liquor which were on his criminal record could have been used by the State for the purpose of impeaching the veracity of his testimony. As the trial court noted, when those prior driving under the influence convictions were obtained against the Petitioner, in 1966 and 1974, there was no indication on the record that the defendant was represented by counsel, that he had affirmatively waived counsel or that he was not indigent. The Petitioner could have been imprisoned following his prior convictions but, on each occasion, was fined instead. After the trial court's ruling that the Petitioner's prior convictions could have been used to impeach his testimony in the event that he took the witness stand to testify at his trial, the Petitioner declined to take the stand to give testimony. He was convicted of operating a motor vehicle while under the influence of intoxicating liquor, third offense, and he received a one year prison sentence. This Court's writs of certiorari should issue to review the decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court, which affirmed the trial court's ruling that prior criminal convictions may be used for impeachment purposes, even though the convictions were obtained when the defendant was indigent, unrepresented by counsel, and had not waived his right to counsel, because those prior convictions did not immediately result in actual imprisonment. Those decisions are inconsistent with this Court's rulings in Argersinger v. Hamlin, 407 U.S. 25 (1972), Loper v. Beto, 405 U.S. 473 (1972), and with a case on which this Court recently denied certiorari, Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976) cert den. U.S. , No. 77-503 (Dec. 13, 1977). The frequency with which such issue certainly arises in criminal cases throughout the state and federal criminal courts, along with the important rights at stake to the Petitioner under the Sixth and Fourteenth Amendments to the United States Constitution, make this issue appropriate for consideration and resolution upon this Court's writs of certiorari.

In Loper v. Beto, 405 U.S. 473 (1973) this Court held that the use of convictions constitutionally invalid under Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony trials) to impeach a defendant's credibility

at his criminal trial deprived the defendant of due process of law. Argersinger v. Hamlin, 407 U.S. 25 (1972) guaranteed misdemeanor defendants the right to be represented by counsel in those cases where their deprivation of liberty was at stake. Argersinger was made fully retroactive in Berry v. Cincinnati, 414 U.S. 29 (1973).

This case is governed by the principles of Loper v. Beto and Argersinger v. Hamlin, supra. The Petitioner was threatened with the prospect that the credibility of his testimony would be impeached by the District Attorney's inquiring into his two prior driving under the influence convictions if he took the witness stand to offer testimony at his trial. The Petitioner thus did not take the witness stand, was convicted of operating a motor vehicle while under the influence of intoxicating liquor, third offense, and was sentenced to serve a one year term of imprisonment. Although the 1966 and 1974 driving under the influence convictions did not result in prison sentences when they were originally returned, the sentence which the Petitioner is currently serving, as a third time offender of the driving under the influence statute, is based upon those prior misdemeanor convictions. Under Loper and Argersinger the 1966 and 1974 convictions, which were obtained when the Petitioner was indigent, unrepresented by counsel and had not waived his right to counsel, could not have been used to impeach the Petitioner's testimony at his 1977 trial. As those earlier convictions were for the same offense (operating a motor vehicle while under the influence of intoxicating liquor) as the offense for which the Petitioner was again on trial, their use for impeachment purposes would have been especially damaging. As the Loper Court recognized, inquiry into the commission of prior criminal offenses can have prejudicial impact on far more than the credibility of a defendant's testimony. 405 U.S. at 482, n. 11. When those convictions were obtained without the defendant's representation by or waiver of counsel, and when the defendant was indigent, they must certainly not be permitted to be used for impeachment purposes under Loper and Argersinger. It cannot be said that, had the Petitioner in the instant case taken the witness stand and testified at his trial, unthreatened by the prospect that his prior uncounselled driving under the influence convictions would have been made the subject of inquiry by the District Attorney, the outcome of the trial would not have been uninfluenced. Loper v. Beto, 405 U.S. 473, 480 (1973).

This Court recently denied certiorari in a case decided by the Fifth Circuit Court of Appeals which reached an opposite result from that arrived at by the North Carolina Court of Appeals and the North Carolina Supreme Court. The Fifth Circuit, in Potts v. Estelle, 529 F. 2d 450 (5th Cir. 1976), cert den. U.S. , No. 77-503 (Dec. 13, 1977), ruled that prior uncounselled misdemeanor convictions could not be used to impeach a defendant's testimony at a later criminal trial, when the prior misdemeanor convictions exposed the defendant to the possibility of incarceration, even though no loss of liberty actually resulted. In Potts the defendant's testimony was impeached at his trial by inquiry into ten prior uncounselled misdemeanor convictions. Of the ten convictions, nine could have resulted in the defendant's incarceration, though only six of the prior convictions actually led to immediate imprisonment. The Court of Appeals for the Fifth Circuit vacated the defendant's conviction and ordered that, on remand for a retrial, none of the nine prior uncounselled misdemeanor convictions for which the defendant might have suffered imprisonment could be used to impeach his testimony.

> By dint of the serious problems associated with the prosecution of misdemeanors, the great concern in Argersinger was with the salutary contributions to be made through the presence of a lawyer in the courtroom representing the interests of the accused. . . . The issues that arise in misdemeanor prosecutions are often complex and beyond the usual competence of the accused. Whether a sentence of imprisonment is actually imposed has little bearing on the complexity of those issues or the ability of the accused to defend himself in the circumstances. . . .
>
> Application of the Cottle [v. Wainwright, 477 F. 2d 269 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973), on remand 493 F. 2d 397 (5th Cir. 1974)] rule, which looks to punishment in fact assessed, can lead to curious practical results. For example, where co-defendants are tried together, the judge or jury, as the case may be, sometimes imposes different sentences on the different co-defendants. Under the Cottle rule, a situation can arise where a co-defendant who is convicted but has his sentence suspended is not protected by Argersinger, but his co-defendant -- convicted of the same crime -- is not subject to later impeachment with his conviction because he is the recipient of a jail term. . . . The rule of Thomas [v. Savage, 513 F. 2d 536 (5th Cir. 1975)] avoids the type of situation depicted above and is, we believe, consonant with the concerns expressed by the Supreme Court in Argersinger. For those reasons, we hold that the necessity of counsel in appellant Pott's prior misdemeanor prosecutions is to be judged by the maximum possible sentence he could have received in each of those prosecutions.

Potts v. Estelle, 529 F. 2d 450, 454 (5th Cir. 1976) cert den. U.S. No. 77-503 (Dec. 13, 1977).

Although the Petitioner in the instant case was fined $100.00 following his convictions in 1966 and 1974 for operating a motor vehicle while under the influence of intoxicating liquor, and was not imprisoned immediately after those uncounselled convictions were obtained, he was subject to the risk of imprisonment for a maximum of 30 days in 1966 (N.C.G.S. § 20-179 (1965)) and six months in 1974 (N.C.G.S. § 20-179 (1973)). He was actually sentenced to a one-year term of imprisonment following his 1977 conviction, after he did not testify at his trial, under threat of impeachment by the prior, uncounselled driving under the influence convictions. The ruling that the Petitioner's credibility could have been impeached through inquiry into the prior uncounselled convictions is in manifest conflict with Loper v. Beto, Argersinger v. Hamlin, and Potts v. Estelle, supra. This Court's writs of certiorari should issue to review the rulings of the North Carolina Court of Appeals and the North Carolina Supreme Court, to correct the denial to the Petitioner of the rights guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution and to resolve the important and recurring question of constitutional law which is here at issue.

CONCLUSION

For the reasons above set forth, the Petitioner respectfully prays that this Court issue its writs of certiorari to review the judgments entered by the North Carolina Court of Appeals and the North Carolina Supreme Court.

This, the 11th day of April, 1978.

THOMAS F. LOFLIN, III
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APPENDIX A

FEB 1 1978

SUPREME COURT OF NORTH CAROLINA

Spring Term 1978

****

STATE OF NORTH CAROLINA

v

DONALD LEE WILLIAMS

JUDGMENT DISMISSING APPEAL ON MOTION OF ATTORNEY GENERAL

(7714SC535)

****

This matter came on to be considered upon Defendant's notice of appeal from the North Carolina Court of Appeals pursuant to G. S. 7A-30, and the Attorney General's motion to dismiss the appeal of the defendant for lack of substantial constitutional question; upon consideration whereof, it is adjudged by the Court in conference this 24th day of January 1978 that the motion to dismiss the appeal be allowed; and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

Issued under my hand and seal of the Supreme Court this 31 day of January 1978.

/s/ John R. Morgan

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Mr. Thomas F. Loflin, III, Attorney at Law
Mr. Nonnie F. Midgette, Associate Attorney
Mr. Anthony Brannon, District ATtorney
Mr. Alton Knight, Clerk of Superior Court

NO. 7714SC535

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 1977

STATE OF NORTH CAROLINA

v. Durham County
No. 76CRS2933

DONALD LEE WILLIAMS

Appeal by defendant from McKinnon, Judge. Judgment entered 15 February 1977 in Superior Court, Durham County. Heard in the Court of Appeals 25 October 1977.

Defendant was charged with driving under the influence, third offense, and driving without a license. He pleaded guilty to both charges in district court and was given a six months' prison sentence. He appealed to superior court where he pleaded not guilty.

Prior to trial in superior court defendant moved to suppress evidence of his two prior convictions for driving under the influence on the ground that they were not constitutionally obtained because he had not been represented by counsel. After reviewing the record of the prior convictions, the court found that in 1974 defendant was convicted in district court of driving under the influence and fined $100; that the record contains no indication that defendant was represented by counsel in either case, or that he waived counsel, or that the guilty plea was voluntarily made, or that defendant was indigent; and that the court would assume for the purpose of ruling on the motion to suppress that defendant was then indigent. The court concluded that the two convictions could be considered in determining punishment on the present charge and that the defendant, should he take the stand, could be impeached with questions relating to the two prior convictions. The motion to suppress was denied.

The State presented evidence tending to show:

At approximately 5:30 p.m. on 2 February 1976, two police officers observed defendant's car sitting on the shoulder of a highway near the Turnkey housing project with its motor running. Inside the car they found defendant slumped behind the wheel, either asleep or passed out, with a hot dog which he had been eating spilled down the front of his

clothing. Defendant smelled of alcohol; he stumbled and almost fell when he tried to get out of the car. The officers assisted defendant into the patrol car and prepared to take him to headquarters at which time defendant expressed concern about a gun which was in his car. The officers then found a .38 caliber pistol under the seat of defendant's car and took it to the station for safekeeping.

At the police station defendant refused to take a breathalyzer test. He answered a question on the AIR form, standardly filled out for any driving under the influence arrest, to the effect that he had been "having sex" for the last three hours. Defendant accused the officers of arresting him just because he was out at Turnkey trying to get a black woman. In the opinion of the officers, defendant was under the influence of alcohol.

Defendant did not take the stand but his son testified that he had been driving the car on the date of his father's arrest when the engine cut off and he walked home to get help; that upon reaching his home he called his uncle for help but before his uncle arrived police came to his house and told him that his father had been arrested. He did not tell police he had been driving the car because he did not think they would listen to him.

The jury found defendant guilty of driving under the influence, third offense, and from judgment imposing prison sentence of one year, he appealed.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Loflin and Loflin, by Thomas F. Loflin, III, for defendant appellant.

BRITT, Judge. Defendant contends the court erred in admitting evidence relating to the pistol found in his car, and his remarks to officers about sex, because such evidence was not only irrelevant but highly inflammatory. The contention has no merit.

We think the evidence of the remarks made by defendant about sex was relevant to show defendant's intoxication at the time they were made, a short while after his arrest. Certainly such remarks are not usual for a person in a normal state of mind. Defendant's argument that the evidence was inflammatory because two of the police officers who testified, and two of the jurors, were black is not supported by the record.

With respect to the pistol, while the record reveals that defendant objected to some of the questions and answers relating to the pistol, he failed to object to others. Assuming, arguendo, that evidence pertaining to the pistol should have been excluded, by failing to object to later admission of the same or similar evidence, defendant lost the benefit of his previous objections. 4 Strong's N.C. Index 3d, Criminal Law § 162.

Defendant contends the court erred in ruling that his prior convictions for driving under the influence could be used to impeach him should he take the witness stand, and in considering said convictions in sentencing him. This contention has no merit.

Defendant argues that under Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), he was entitled to representation by an attorney at said previous trials; that because of his indigency he was not able to employ counsel and that the court did not appoint counsel for him; therefore, the convictions were invalid and the record relating to them should not be used against him for any purpose. We reject this argument.

We interpret Argersinger to hold that a person may not be imprisoned for an offense unless, absent a waiver, he was represented by counsel at his trial. Defendant was not sent to prison in the cases in question.

Defendant contends the court erred in imposing a greater sentence than was imposed in district court. This contention has no merit. Defendant's argument on this point was rejected by our

Supreme Court in State v. Harrell, 281 N.C. 111, 187 S.E. 2d 789 (1972), and cases therein cited.

In defendant's trial and the judgment appealed from, we find

No error.

Judges HEDRICK and MARTIN concur.

Report per Rule 30(e).

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1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6595

DONALD LEE WILLIAMS,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA AND
THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF OF RESPONDENT, THE STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I N D E X

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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BRIEF OF RESPONDENT,
THE STATE OF NORTH CAROLINA, IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

In an unpublished opinion filed November 16, 1977, and reported at 34 N.C. App. 502, 239 S.E. 2d 69 (1977), the North Carolina Court of Appeals affirmed the conviction of petitioner. A copy of the Court of Appeals' opinion was affixed to petitioner's Petition. The North Carolina Supreme Court dismissed petitioner's appeal from the judgment of the North Carolina Court of Appeals, reported at 294 N.C. 187, 241 S.E. 2d 73 (1978). That opinion was also attached to the Petition of petitioner Williams.

From the judgment below, Williams has filed this Petition for Writ of Certiorari to the North Carolina Supreme Court in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE PROCEDURE FOR SENTENCING ON TRIAL DE NOVO WHERE THE JUDGE IS ON CONSTRUCTIVE NOTICE OF THE LOWER COURT'S SENTENCE AND IMPOSES A HARSHER SENTENCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS MAY CONSTITUTIONALLY BE USED TO ENHANCE SENCENCING UPON LATER CONVICTIONS?

3. WHETHER PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS WHICH DO NOT RESULT IN INCARCERATION MAY BE USED TO IMPEACH DEFENDANT AT A LATER TRIAL?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.C.G.S. §7A-271(b) (1977 Supp.):

"Appeals by the . . . defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance."

N.C.G.S. §20-138(a) (1975):

"It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within the State."

N.C.G.S. §20-179(a) (1975):

"Every person who is convicted of violating G.S. 20-138 . . . shall be punished as follows:

(1) For the first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred ($500.00) dollars, by imprisonment for not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(2) For a second conviction of any offense under G.S. 20-138, . . . by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than two months nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(3) For a third or subsequent offense under G.S. 20-138, . . . by a fine of not less than five hundred dollars ($500.00), by imprisonment for not more than two years, or by both such fine and imprisonment, in the discretion of the court."

STATEMENT OF THE CASE

The petitioner was originally brought for trial in the Durham County, North Carolina District Court under a warrant which charged him with operating a motor vehicle while under the influence of intoxicating liquor (third offense), and with operating a motor vehicle without being licensed. The petitioner entered pleas of guilty to both offenses, judgments were entered accordingly, and the petitioner was sentenced to serve a term of six months in prison. The petitioner thereafter exercised his right to appeal to the Durham County Superior Court for trials de novo on the charges. All of the files maintained on the District Court proceedings, including the fact of the convictions and the terms of the petitioner's sentence, were forwarded to the Superior Court prior to the petitioner's trial in that Court.

Following the appeal from District Court, and after trial by jury, the petitioner was convicted in Superior Court of the crime of operating a motor vehicle while under the influence of intoxicating liquor, in violation of N.C.G.S. §20-138. He was acquitted on the charge of operating a motor vehicle without being licensed. The petitioner was punished as one who had suffered his third conviction under the driving under the influence statute, as allowed by N.C.G.S. §20-179(a)(3). The Superior Court judge sentenced the petitioner to serve a one-year term of imprisonment, although the District Court had imposed only a six months sentence where the petitioner had been convicted of two offenses, in contrast to the sole conviction which was returned in the Superior Court.

The petitioner was convicted in Superior Court, and sentenced as a third time offender of the driving under the influence statute, on February 15, 1977. The punishment statute authorized the imposition of a maximum six months term of imprisonment for those convicted under the driving under the influence statute on fewer than three occasions, N.C.G.S. §§20-179(a)(1), (2), and allows for a sentence of up to two years upon third and subsequent convictions. N.C.G.S. §20-179(a)(3). The two prior convictions for driving under the influence were obtained against the petitioner on June 17, 1966 and on December 10, 1974. As to each of those convictions the Superior Court judges specifically found, as of record, that: "There is no indication in the record that the [Petitioner] had counsel, or that he, by any affirmative act, waived counsel . . . . and the Court assumes for the purpose

of this ruling that he was indigent at that time." (Record on appeal to North Carolina Court of Appeals at p. 19). Following each of the prior convictions the petitioner was fined $100.00 and ordered to pay the costs of Court. He did not receive a jail sentence, either active or suspended, following either of the prior uncounselled convictions. The Superior Court judge ruled that the 1966 and the 1974 driving under the influence convictions could lawfully be considered to support the petitioner's conviction and sentencing as a third time offender of the statute. Although the petitioner received no jail sentence following either of his two previous convictions, the one-year jail sentence which the petitioner was ordered to serve following his 1977 conviction as a third time offender could not have been imposed but for the existence of the two prior uncounselled driving under the influence convictions on his criminal record.

The Superior Court judge further ruled that, in the event the petitioner took the witness stand to testify on his own behalf at his trial, the District Attorney would be allowed to inquire of the 1966 and 1974 uncounselled driving under the influence convictions, for impeachment purposes. Following that ruling the petitioner did not take the witness stand to offer his own testimony at the trial.

The petitioner began service of his one-year prison sentence pursuant to his conviction as a third time offender of the statute proscribing the operation of a motor vehicle while under the influence of intoxicating liquor on February 20, 1978.

ARGUMENT

1. THE PROCEDURE FOR SENTENCING ON TRIAL DE NOVO WHERE THE JUDGE IS ON CONSTRUCTIVE NOTICE OF THE LOWER COURT'S SENTENCE AND IMPOSES A HARSHER SENTENCE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner urges this Court to grant a Writ of Certiorari to review the procedure for sentencing on trials de novo in North Carolina where he alleges the Court is on at least constructive notice of the lower court's sentence prior to imposing a harsher sentence. The thrust of his argument is that the threat of vindictiveness requires that the reasons for a more severe sentence than that received in the first instance affirmatively appear in the record under the decisions in North Carolina v. Pearce, 395 U.S. 711 (1969) and its progeny, including Colten v. Kentucky, 407 U.S. 104 (1972); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Blackledge v. Perry, 417 U.S. 21 (1974); and Ludwig v. Massachusetts, 427 U.S. 618 (1976). Respondent urges that under the facts in this instance, petitioner's argument be rejected.

In Colten v. Kentucky, 407 U.S. 104 (1972), this Court recognized the two-tier system for adjudicating less serious criminal cases in Kentucky as being similar to that under consideration in this instance. Colten v. Kentucky, supra, at Footnote 4. In that instance, as we have here, the trial de novo court was aware of the sentence imposed by the Court of the first instance. Colten v. Kentucky, supra, at Footnote14. The Supreme Court was aware of this fact when it acted in the Colten case but did not find that per se such was inconsistent with its previous holdings.

In Chaffin v. Stynchombe, 412 U.S. 17 (1973), this Court acknowledged the possible imposition of a harsher sentence in the two-tier system but noted the absence of vindictiveness in the two-tier system. The Court said:

> "The question in that case was whether the Pearce principle applied to bar the imposition of a higher sentence after a de novo trial in those jurisdictions that employ a two-tier system of trial courts. While noting that '[i]t may often be that the [de novo "appeal" court] will impose a punishment more severe than that received from the inferior court', id. at 117, we were shown nothing to persuade us that 'the hazard of being penalized for seeking a new trial, which underlay the holding of Pearce, also inheres in the de novo trial arrangement." Id. at 116 (emphasis added). In short, the Due Process Clause was not violated because the 'possibility of vindictiveness' was not found to inhere in the two-tier system. Ibid." Chaffin, at 26.

Under Chaffin, it was noted that the jury was not aware of the accused's prior convictions or sentences. But even in cases where the Court has been aware, the absence of vindictiveness has been the determinant issue. (See Colten v. Kentucky, supra; Ludwig v. Massachsetts, 427 U.S. 618 [1975]).

In this instance, the petitioner received a six month sentence upon conviction for two offenses in the District Court. Upon appeal de novo, he received a one year sentence upon conviction for a single offense. Petitioner alleges that the Court was on notice of the District Court sentence at the

time of sentencing and therefore, could not have received a harsher sentence without the reasons affirmatively appearing.

In discussing the logic, and in upholding the right of the Superior Court on trial de novo to impose a harsher sentence after being convicted in an inferior court without requiring that reasons for the harsher sentence be given by the trial court, the Supreme Court of the United States stated:

> "We see no reason, and none is offered, to assume that the de novo court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.
>
> It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial de novo represents a completely fresh determination of guilt or innocence." Colten, supra, at 117.

Although petitioner received a greater sentence in this instance for one offense than he did initially for two offenses, there is no showing of vindictiveness on the part of the trial court as a desire to punish petitioner for exercising his right to a trial by jury. The fact that the Court had constructive notice of petitioner's prior sentence does not alter the facts in this instance.

Petitioner was convicted on a single count of driving under the influence, third offense. The sentence of one year was within the maximum allowed under G.S. §20-179. The Court having heard the testimony and observed defendant throughout trial was in a position to fit the punishment to the crime. In his discretion and within the limits allowed by the statutes of North Carolina, the trial judge met his responsibility. That decision should not be questioned absent a showing of vindictiveness which Petitioner has not shown. For the reasons hereinabove stated, the petitioner's Writ of Certiorari should be denied.

II. THE PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS MAY BE USED TO ENHANCE SENTENCES UPON LATER CONVICTIONS.

Petitioner, in this instance, was convicted of operating a motor vehicle while under the influence of intoxicating liquor for the third offense. Under G. S. 20-179, conviction for the third offense is punishable by a fine of not less than five hundred dollars, by imprisonment for not more than two years, or both in the discretion of the judge. Imprisonment and/or fine is less if conviction is for the first or second offense of the same charge. Thus, the two prior convictions enhance the punishment for a third offense of the same nature.

Petitioner argues that in allowing for the imposition of a one-year sentence in this instance, which could not have been imposed but for the existence of the two prior uncounselled misdemeanor convictions, the State of North Carolina is in conflict with Argersinger v. Hamlin, 407 U.S. 25 (1972); Burgett v. Texas, 389 U.S. 109 (1967) and with the Sixth and Fourteenth Amendments to the United States Constitution. We believe petitioner's view to be in error.

Argersinger holds that a person may not be imprisoned for an offense unless, absent a waiver, he was represented by counsel at his trial. In the prior uncounselled misdemeanor convictions in this instance, petitioner was not imprisoned in either instance. Argersinger requires legal counsel only if incarceration results from conviction. The petitioner here is not entitled to the benefit of the Argersinger v. Hamlin holding to escape incarceration in this instance where he was represented by counsel.

Burgett v. Texas, supra, fails to aid petitioner in this instance, also. Burgett held that conviction, obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963) could not be used to support the imposition of an enhanced punishment.

In Gideon v. Wainwright, supra, petitioner, indigent, requested that the State of Florida provide him with appointed counsel for a felony charge which the Court denied. The United States Supreme Court held that indigent defendants charged with felonies were entitled to court appointed counsel.

The Burgett ruling expanded that holding, but it too was concerned only with the use of felonies to enhance punishment. Thus, the holding in Burgett, "to permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense" is not applicable in this instance. It applies to felonies, not misdemeanors.

In this instance, the prior uncounselled misdemeanor convictions did not result in incarceration. Thus, court appointed counsel was not required. Petitioner, under the circumstances of the prior misdemeanor court appearances, was not entitled to counsel, his convictions were valid constitutionally and could be used to enhance future punishment.

For the reasons stated, this Court should not issue a Writ of Certiorari in this matter.

III. PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS WHICH DO NOT RESULT IN INCARCERATION MAY BE USED TO IMPEACH DEFENDANT AT A LATER TRIAL.

In this instance, the trial court ruled that if the petitioner had taken the witness stand to testify he was subject to impeachment by use of the prior uncounselled convictions. Relying upon Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976), cert. den., 434 U.S. 1001 (1977), petitioner argues that the prior uncounselled convictions could not be used to impeach a defendant's testimony at a later criminal trial when the prior misdemeanor conviction exposed the defendant to the possibility of incarceration although no incarceration occurs. Respondent urges that this view be rejected.

In Loper v. Beto, supra, the United States Supreme Court ruled that the use of "convictions constitutionally invalid under Gideon v. Wainwright to impeach a defendant's creditability deprives him of due process". Loper at 483.

In Loper, defendant questioned the use by the prosecutor for impeachment purposes, of four prior uncounselled felony convictions. Since Gideon v. Wainwright is concerned with felonies, and likewise Loper, it is the respondent's view that the holding of those cases, coupled with Argersinger and Berry v. Cincinnati, 414 U.S. 29, 94 S.Ct. 193, 38 L.Ed. 2d 187 (1973), limit its rulings to felony convictions.

Respondent takes the view which the Fifth Circuit reached in Cottle v. Wainwright, 477 F.2d 269 (1973), that Argersinger applied in misdemeanor convictions only where defendant suffered incarceration. Although Cottle was overturned by Potts, supra, the rationale of Cottle is applicable here. The Court said there:

> "The Court in Argersinger made it clear that 'no person may be imprisoned . . . unless he was represented by counsel.' 407 U.S. at 37, 92 S.Ct. at 2012 (Emphasis added). Thus, the court concluded, 'The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the guiding hand of counsel" so necessary when one's liberty is in jeopardy.' at 40, 92 S.Ct. at 2014. (Emphasis added). Inasmuch as Cottle, for all that appears, was not deprived of his liberty when he was convicted the first time of public drunkenness, the conviction is not tainted by reason of the fact that he was not afforded counsel to represent him. However, as to his second conviction, which did in fact result in imprisonment, Cottle was constitutionally entitled to counsel, and, none having been provided, that conviction is invalid and may not be considered by the Parol Commission in any future proceeding to revoke Cottle's parole."

In the case at bar, petitioner did not suffer incarceration. Since Argersinger made it clear that it was concerned with imprisonment without counsel and Loper, supra, is concerned only with a felony, neither is applicable in this instance.

Potts v. Estelle, upon which petitioner chiefly relies, overruled the Fifth Circuit's earlier decision under Cottle and expanded the holding of Argersinger. Potts recognized that the Supreme Court in Argersinger, did not address the question of "Gideon's application to the situation where the maximum possible sentence for a particular offense is imprisonment, but the sentence actually imposed is only a fine or a term of imprisonment that is suspended." Potts v. Estelle, supra at 453. In answering that issue, the Fifth Circuit went beyond Argersinger, respondent believes unnecessarily.

Where Argersinger made it clear that "no person may be imprisoned . . . unless he was represented by counsel", Argersinger, supra at 37; Potts holds that the necessity for counsel in "prior misdemeanor prosecutions is to be judged by the maximum possible sentence. . . ", Potts, supra at 454. Such expansion of the rule in Argersinger is not needed nor desired. Respondent urges that this view be rejected and that the petitioner's request for Writ of Certiorari be denied.

CONCLUSION

For the reasons stated above, the Respondent submits that there is no error in the decisions of the North Carolina Court of Appeals, and the Supreme Court of North Carolina, and that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing and attached Brief of Respondent, The State of North Carolina, in Opposition to Petition for Writ of Certiorari, was served upon the Petitioner, through his counsel of record, by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Mr. Thomas F. Loflin, III
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This the 28th day of June, 1978.

RUFUS L. EDMISTEN
Attorney General

T. Buie Costen
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